

2007

Brazilian Update: Law and Economic Issues

Marcos Valadoa

Nara Galeb Porto

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

Marcos Valadoa et al., *Brazilian Update: Law and Economic Issues*, 13 LAW & BUS. REV. AM. 235 (2007)
<https://scholar.smu.edu/lbra/vol13/iss1/13>

This Update is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BRAZILIAN UPDATE: LAW AND ECONOMIC ISSUES

*Marcos Valadão**
*and Nara Galeb Porto***

I. ECONOMIC AND INTEGRATION LAW

A. ECONOMICS

IN July 2006, the World Bank prepared a report comparing doing business in thirteen cities in Brazil.¹ The report finds that state and city level reforms are becoming increasingly important in a globalized world, where cities, as much as countries, compete for investment. The report compares doing business in cities in Brazil with cities in Mexico—where there is another report of this kind²—and with more than 150 countries around the world.

Below, we highlight some of the main points of interest of the report.

First, the report analyzed the issues of starting a business in Brazil.³ The findings were not very enthusiastic: “In Latin America, only Venezuela and Haiti regulate business more heavily than Brazil.”⁴ The report suggests that “[s]tates should look for best practices within Brazil . . . while also aiming for the pace of reforms in countries like Chile, Vietnam or Slovakia.”⁵ When ranked internationally on the time to start a business, Brazilian states vary significantly, depending on local requirements;

* Marcos Aurélio Pereira Valadão, Professor of Law (Universidade Católica de Brasília School of Law, Brazil); S.J.D. (SMU), LL.M. (UnB, Brazil), LL.M. International and Comparative Law (SMU), LL.B. (UCG, Brazil), MBA (IBMEC, Brazil), B.S. (UnB, Brazil). The author may be contacted by e-mail at mvaladao@mail.smu.edu or profvaladao@yahoo.com.br.

** International and Comparative Law (SMU), LL.B. (PUC/SP, Brazil); licensed to practice law in Brazil and New York. The author may be contacted at naraporto38@yahoo.com.

1. THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/THE WORLD BANK, *DOING BUSINESS IN BRAZIL* (2006), http://www.doingbusiness.org/documents/doing_business_in_brazil_07.pdf. The report covers the following thirteen cities in Brazil: Brasília, Federal District; Manaus, Amazonas; Belo Horizonte, Minas Gerais; Porto Velho, Rondônia; São Luís, Maranhão; Porto Alegre, Rio Grande do Sul; Campo Grande, Mato Grosso do Sul; Rio de Janeiro; Florianópolis, Santa Catarina; Salvador, Bahia; São Paulo; Cuiabá, Mato Grosso; and Fortaleza, Ceará.

2. THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT/THE WORLD BANK, *DOING BUSINESS IN MEXICO* (2006), http://www.doingbusiness.org/documents/DB_Mexico_English.pdf.

3. *DOING BUSINESS IN BRAZIL*, *supra* note 1, at 4-5.

4. *Id.* at 1.

5. *Id.* at 2.

for example, "São Paulo ranks 149 out of 155 economies on the time to start a business," and "Minas Gerais, the state with the shortest time to start a business in Brazil . . . ranks 30th worldwide."⁶ In Brazil, it takes nineteen days in Minas Gerais and 152 days in São Paulo to start a business.⁷ The report states that the consequence of this high cost of doing business is informality, a serious problem in Brazil.⁸

Second, the report analyzed the area of registering property.⁹ The report states that "[r]egistering property in many Brazilian states is difficult in comparison with the rest of Latin America."¹⁰ The report finds that "an entrepreneur spends on average 61 days and 3.5% of the property value to register property. This ranks 17 out of 22 countries in Latin America, where the rank is an average of country rankings on numbers of procedures, time and cost."¹¹ The report also finds that "[o]verall, Brazilian states perform better than Mexican states regarding the cost of registering property."¹²

Third, the report analyzed the issue of time and cost to create and register collateral.¹³ The report finds that, in Minas Gerais, the time and cost to create and register collateral takes only two days, "less than half the time that is necessary in the best performing state of Mexico. But it takes 45 days in the Federal District to do the same."¹⁴ The costs also vary significantly: "[i]n Rio de Janeiro an entrepreneur spends only 0.2% of the loan value to register a security right," but in Ceará an entrepreneur spends 3.8 percent of the value of the loan—much higher than the average across the twelve states at approximately 1.7 percent.¹⁵

Fourth, the report analyzed paying taxes in Brazil.¹⁶ The report states that "[t]he Brazilian tax system is among the most complex and burdensome in the world."¹⁷ Even the best performing state in Brazil is almost double the average in Latin America and the Caribbean.¹⁸ The report finds that Rio de Janeiro has one of the highest tax burdens in the world, and businesses pay less in Amazonas, Ceará, Santa Catarina, and Bahia.¹⁹

Finally, the report analyzed the enforcement of contracts in Brazil.²⁰ The report states that, in Latin America, "the average time spent enforcing a contract is over a year and costs amount to more than 30% of the

6. *Id.*

7. *Id.*

8. *Id.* at 3.

9. *Id.* at 6.

10. *Id.*

11. *Id.*

12. *Id.* at 7.

13. *Id.* at 8.

14. *Id.*

15. *Id.*

16. *Id.* at 9.

17. *Id.*

18. *Id.* at 10.

19. *Id.* at 9-10.

20. *Id.* at 11.

debt.”²¹ It finds that, in Brazil, “[t]he easiest state in which to enforce a contract is São Paulo, where enforcing contracts takes 18 months. This is still 3 times slower than the fastest state in Mexico and longer than Buenos Aires, Bogotá, or Shanghai.”²² The report states that “[t]he judicial system in Brazil is perceived as slow, time consuming and unpredictable.”²³ “Trials can last for years; multiple appeals are common—increasing costs and uncertainty (in Brazil, 88% of commercial cases are appealed, in Argentina 13%, Peru 17%, and in Mexico 30%).”²⁴ “The Supreme Court in Brazil handles more than 100,000 cases a year versus approximately 200 cases handled by its counterpart in the United States.”²⁵ The report finds that “[a]ccess to justice is cheapest in São Paulo, where it costs 15.5% of the debt value” (cost is comprised of court expenses and attorneys fees), and highest in Maranhão, where it costs 48.3 percent.²⁶ “Total time in court, including enforcement, is approximately 18 months in São Paulo,” but in Rio Grande do Sul, it can take over four years.²⁷

We find this report very important because it serves as a guide to understanding the problematic areas faced by the people doing business in Brazil, and it is one step forward for the Brazilian government to make a more effective reform in these areas.

B. INTEGRATION

The Free Trade Area of the Americas (FTAA) reached a stalemate when its terms became part of the debate between agricultural subsidies in the United States and market opening for industrialized goods and services by Latin American undeveloped and developing countries. This mirrors the situation at the World Trade Organization (WTO) negotiations. Brazil leads the discussion toward the breaking or weakening of U.S. barriers for primary goods exported by Latin American countries to the United States. On the other side, the United States says that these subjects shall be discussed in a major arena, i.e., the WTO, because other countries could gain an advantage—namely the European Union, whose countries also apply a heavy subsidy policy to support their agriculture.

While the trade negotiations are deadlocked, the political side of the Latin American integration is taking different steps. Venezuela joined MERCOSUR as a full member in July 2006, and Chile finally joined the

21. *Id.*

22. *Id.* at 2.

23. *Id.* at 11.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* It is important to point out that the civil and criminal procedure code and the civil and criminal code are federal. The discrepancy of costs and agility of the judiciary in the different states is because they have autonomy to do their own internal organization and internal rules of procedure.

Andean Community as an Associate Member in September 2006.²⁸ Now MERCOSUR has three out of the four most important economies in South America. But it is not clear that this political cohesion will result in further trade negotiations. Actually, it may work to slow down FTAA negotiations because if one considers MERCOSUR acting as a block, with Venezuela (Chavez) strengthening its anti-U.S. position, it will be more difficult for the FTAA to come to a consensus on those crucial issues. On the other hand, it is still unclear how Chile will move because it has a direct trade agreement with the United States, it is a full member of the Andean Community, and it is also a MERCOSUR associate country. In this sense, Brazil is insulated from direct negotiations with the United States and other South American countries because all Brazilian negotiations in the region are made through MERCOSUR.

Despite this imbroglio, MERCOSUR negotiations are still on—for example, the negotiations toward a Common Customs Code, which will apply to MERCOSUR borders, and the continuous attempt to strengthen relations with the European Union. Actually, the European Union has expressed its willingness to finish negotiations for a free trade agreement with MERCOSUR as soon as possible. The negotiations will be reinitiated in November 2006, and it is planned to be finished within two months.²⁹

C. LEGAL DEVELOPMENTS³⁰

Brazil has been struggling with the modernization of the legal framework for investment protection, updating mechanisms for dispute resolution (which includes private arbitration and judicial procedure), and updating old codes. It is worth mentioning the new Civil Code that en-

28. Venezuela was accepted as full member of MERCOSUR through a MERCOSUR Protocol signed in Caracas on July 4th, 2006 (Protocol of Adhesion of Bolivarian Republic of Venezuela as Full-Member of MERCOSUR). See Luiz Inácio Lula da Silva, Address at Caracas, Na Cerimônia de Assinatura do Protocolo de Adesão da Venezuela como Membro-Pleno do Mercosul (July 4, 2006), available at <http://www.info.planalto.gov.br/download/discursos/PR1226A.DOC> (text in Portuguese) (last visited Jan. 4, 2007). The National Congress of Venezuela has approved the protocol, the ratification was published by the Official Journal of Venezuela (*Gaceta Oficial*) on July 19, 2006. See Protocolo de Adhesión de la Republica Bolivariana de Venezuela al MERCOSUR, Año CXXXIII – Mes X *Gaceta Oficial de la Republica Bolivariana de Venezuela* No. 38.482 (July 19, 2006), available at <http://www.tsj.gov.ve/gaceta/julio/190706/190706-38482-01.html> (last visited Jan. 4, 2007).

Chile was a founding member of the Comunidad Andina de Naciones (CAN) in 1969, but withdrew from it in 1976. Now Chile is returning to CAN as an associate member. See *CAN-Chile*, ANDEAN COMMUNITY, <http://www.comunidadandina.org/ingles/Exterior/chile.htm> (last visited Jan. 3, 2007).

29. Assis Moreira, *União Européia Quer Acelerar Acordo de Livre Comércio com o Mercosul*, VALOR ECONÔMICO, Oct. 3, 2006, <http://noticias.uol.com.br/economia/ultnot/valor/2006/10/03/ult1913u58280.jhtm>.

30. This is the first issue of the Brazilian Update Section, which is designed to appear in every Winter and Summer issue of LBRA. This legal developments subsection will mention some legal news that is not new in the strict sense, but is still very important.

tered into force in 2003,³¹ the new bankruptcy law that entered into force in 2005,³² and the changes in civil procedure that were made through a serial modification in the Civil Procedure Code enacted in 1973. The Federal Constitution was changed regarding financial system discipline; there were also changes in laws (statutes), and monetary authorities regulations were enacted toward spreading financial access. This survey is a brief review of the last eight years.

More recently, one important change in the Civil Procedure Code was made by restricting the autonomy of the procedure to enforce judicial awards.³³ Before the change, enforcement of judicial awards was made through an independent procedure (called execution procedure), which had the deleterious effect of delaying the enforcement of judicial decisions. Under the new system, enforcement of the judicial awards is continuous. That is to say, the successful party in a lawsuit does not need to file another judicial procedure to have its request accomplished; now, the decision starts the enforcement procedure directly.³⁴ It gives power to decision makers and the judicial decision itself, saves time and money, and makes law enforcement more effective.

Another remarkable change has been made in tax laws applicable to foreign investments. The last legal change was Federal Law No. 11.312 of 2006,³⁵ which exempted foreign investors from taxes on remittance of interest and capital gains obtained from investment funds and papers issued by the government. Thus, in general, foreign investors do not pay income taxes on investments in Brazil.³⁶ The law also exempted foreign investors from the Provisory Contribution on Financial Operations (CPMF-*Contribuição Provisória sobre Movimentação Financeira*)³⁷—a tax levied on

31. Código Civil [C.C.] [Civil Code] *promulgated* by Lei No. 3.071, de 1 de janeiro de 1916, Col. Leis Rep. Fed. Brasil, *repealed* by Código Civil [C.C.] [Civil Code] *promulgated* by Lei No. 10.406, de 10 de janeiro de 2002, D.O.U. de 11.01.2002 (Brazil).

32. Lei No. 11.101, de 09 de fevereiro de 2005, D.O.U. de 09.02.2005 (Brazil), *amended* by Lei No. 11.127, de 28 de junho de 2005, D.O.U. de 29.06.2005 (Brazil). This new law grants claims guaranteed by security interests (in the sense of a lien created by an agreement), but limited to the value of the encumbered asset, as claims with privilege (these are the common financial institution claims) with priority over other debts, except for the labor-related claims (limited to an amount equal to 150 minimum wages per creditor) and workplace accident claims. This new law definitely reduces lenders' risks in credit transactions if one compares it to the old bankruptcy law that used to classify claims granted by security interests as credit without privileges.

33. Lei No. 11.232, de 22 de dezembro de 2005, D.O.U. de 23.12.2005 (Brazil).

34. *See generally* Marcos César Botelho, *Comentários às alterações da Lei nº 11.232/2005* (Comments on Law n. 11.232/2005), 10 REVISTA JURIS PLENUM, 59, 59-76 (2006).

35. Lei No. 11.312, de 27 de junho de 2006, D.O.U. de 28.6.2006 (Brazil).

36. Brazilian tax law does not apply what is called double economic taxation on corporations. Thus, dividends and profit distribution are exempt from income tax; it does not matter if either is distributed to domestic or foreign shareholders.

37. Lei No. 9.311, de 24 de outubro de 1996, D.O.U. de 25.10.1996 (Brazil), *amended* by Lei No. 10.174, de 9 de janeiro de 2001, D.O.U. de 10.01.2001 (Brazil), Lei No. 10.306, de 8 de novembro de 2001, D.O.U. de 09.11.2001 (Brazil), Lei No. 10.892, de 13 de julho de 2004, D.O.U. de 14.07.2004 (Brazil), Lei No 11.110, de 25 de

banking debts and transfers under the bank system. These measures are akin to others, which are targeted to attract foreign investment and alleviate problems in financing public debt.

Another recent law worth mentioning is the new law on Domestic and Family Violence against Women, Federal Law No. 11.340 of 2006.³⁸ The Law was enacted according to a commitment made by Brazil when it signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Inter-American Convention to Prevent, Eliminate, and Punish Violence Against Women. It is a cultural issue; the law reinforces the fight against gender discrimination in Brazil.

II. IN GENERAL

On October 29, 2006, President Lula (Luiz Inácio Lula da Silva) was re-elected by a 20 million vote margin over the opposition candidate, Geraldo Alckmin, extending his position as President of Brazil until the end of 2010. In the 2007/2010 Government Platform,³⁹ Lula said that his second term of office will be named development, development with income distribution and quality education.⁴⁰ He said that he is committed to the Brazilian people to keep struggling against social exclusion, poverty, and inequality.⁴¹

With respect to foreign policy, the Government Platform states that the government will keep a more independent policy toward international commerce and not automatically align with the United States on all international issues, which includes a Brazilian position in the United Nations Security Council.⁴² Lula stated that the government will prioritize the South-American integration process and strengthen South-South relations, placing special emphasis on its relations with countries of the African continent, while simultaneously seeking to gain more access to the large European, North-American, and Asian markets and maintain a positive and sovereign relationship with the developed countries. He also said that he will keep his initiatives in favor of a fairer economic, financial, and commercial order that will benefit the poor and developing countries.⁴³

One of the actions of the Lula government is towards the South-American integration process, which will strive to eliminate dollar-denominated transactions with Latin-American countries and stimulate a more encompassing mechanism, the Reciprocal Credit Agreement, and other

abril de 2005, D.O.U. de 26.04.2005 (Brazil), Lei No. 11.196, de 21 de novembro de 2005, D.O.U. de 22.11.2005 (Brazil), Lei No. 11.312, de 27 de junho de 2006, D.O.U. de 28.06.2006 (Brazil).

38. Lei No. 11.340, de 07 de agosto de 2006, D.O.U. de 08.08.2005 (Brazil).

39. Lula President, *Government Platform 2007/2010*, PARTIDO DOS TRABALHADORES, available at <http://www.pt.org.br/site/assets/ProgramaIngles.pdf> (last visited Dec.18, 2006).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

instruments that allow trade payments in local currency.⁴⁴

With respect to human rights, Lula said that he will attempt to continue the performance in the United Nations and Inter-American Human Rights systems, strengthening the negotiation arena for MERCOSUR.⁴⁵

44. *Id.*

45. *Id.*

